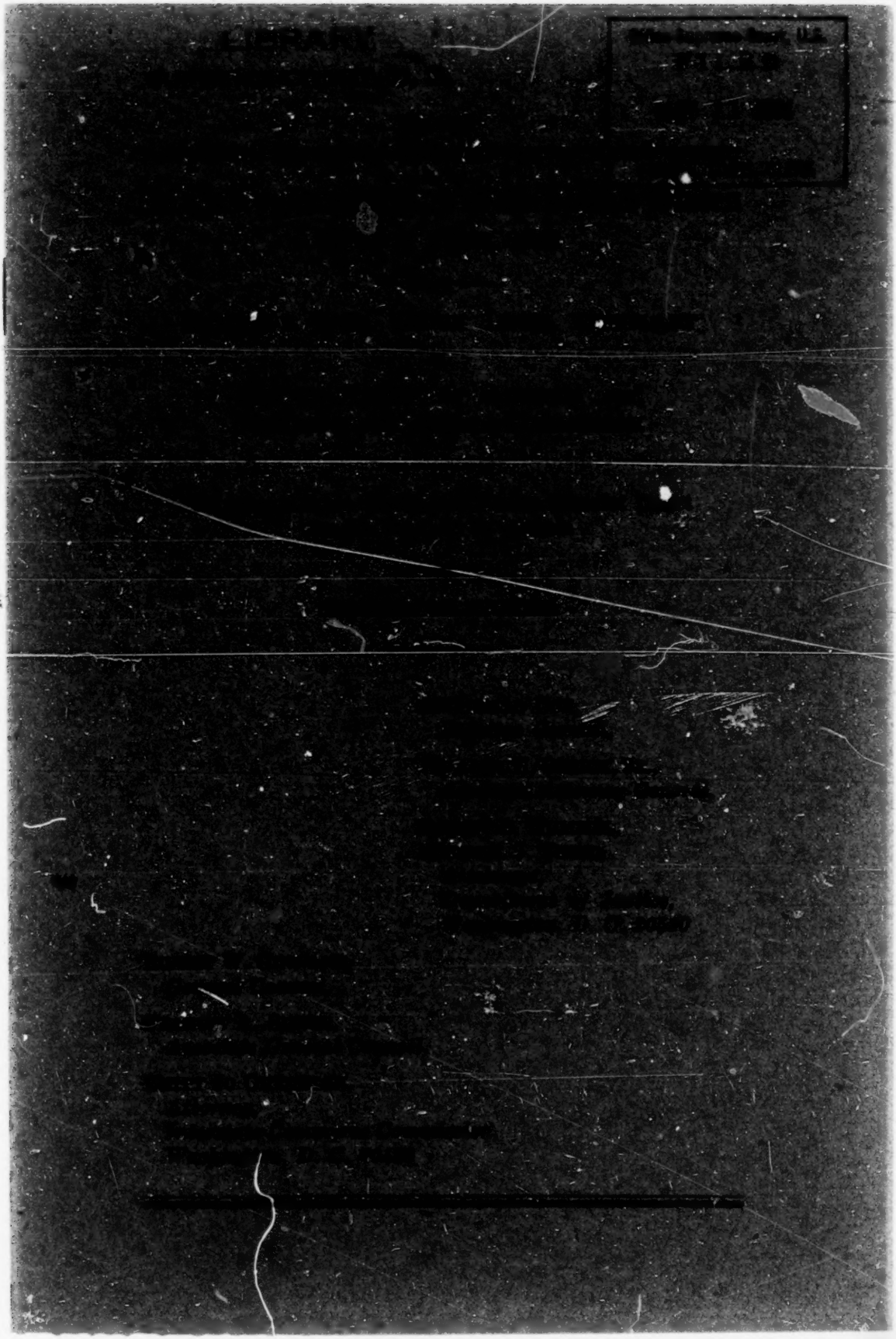

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 993

MITCHELL BROS. TRUCK LINES, APPELLANT

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the District of Oregon

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on December 20, 1963, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325,

dismissing an action brought to set aside an order of the Interstate Commerce Commission entered in *Mitchell Bros. Truck Lines—Investigation of Operations*, 91 M.C.C. 267. The order of the Commission directs appellant to cease and desist from conducting certain motor common carrier operations found to be beyond the scope of its authority.

Appellant, a common carrier by motor vehicle, is authorized by certificates of public convenience to transport, *inter alia:*

> *Building materials* and *Heavy machinery*, in truckloads
>
> *Building materials* and *Heavy Machinery*, including steel girders, steel pipe, boilers, water works supplies, and plumbing goods; cement, cast stone, wooden pipe and tanks (set up or knocked down), and fabricated steel reinforcing bars, and other commodities of similar nature.
>
> *Machinery, contractors' equipment* and *construction materials*
>
> *Heavy machinery* and *Building materials*

Under the purported authority of one or more of the above certificates, appellant has transported, so far as is here in question, electric cable, transformers and regulators.

In 1960, the Commission, on its own motion, instituted an investigation under Sections 204(c) and 212(a) of the Interstate Commerce Act, 49 U.S.C. 304(c) and 312(a), to determine whether, in transporting electric cable, transformers and regulators,

among other commodities, appellant had violated Section 206(a) of the Act, 49 U.S.C. 306(a), which forbids a carrier to transport commodities without certificated authorization. After full administrative proceedings, the Commission, Division 1, held that, under its authority to transport "building materials", appellant may transport electric cable, 91 M.C.C. at 270, and that under its authority to transport "construction materials", appellant may transport electric cable, transformers and regulators, 91 M.C.C. at 272. Acting under either authority, however, appellant may not transport any of these commodities when it knows or is on notice that such commodities are not to be used as "building materials" (in the case of electric cable) or as "construction materials" (in the case of electric cable, transformers and regulators), 91 M.C.C. 267, 270-72.

In its report, the Commission considered and rejected appellant's contentions: (a) that the commodity description "building materials and heavy machinery including [nine specific commodities] and other commodities of similar nature" embraces commodities which may be similar to building materials and heavy machinery, (b) that "heavy machinery" embraces electric cables, transformers, and regulators, and (c) that electric cable is a "building material", and electric cable, transformers and regulators are "construction materials" whether or not the particular shipment is intended for such use; and that the Commission may not apply an "intended use" test to either commodity description.

The district court, in an opinion reported at 225 F. Supp. 755 (D. Ore., 1963), unanimously upheld the Commission's interpretation of the various commodity descriptions, concluding that the application of the intended use test to define appellant's certificates was a valid exercise of the Commission's discretion (J.S. 32), and that the Commission's findings were supported by substantial evidence. (J.S. 34).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. It involves the interpretation of certain commodity descriptions in appellant's certificates of public convenience and necessity in light of well settled principles. The district court correctly upheld the Commission's interpretation of such certificates.

1. The interpretation of a certificate issued by the Commission is ordinarily a matter for that agency (see *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177), unless, of course, its interpretation is clearly erroneous. *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. Appellant's principal contention is that the Commission erroneously refused to include electric cable, transformers and regulators within the italicized portion of the phrase "building materials and heavy machinery, including [nine specific commodities] *and other commodities of similar nature*." The argument is that appellant's certificate, as well as authorizing the carriage of

building materials and heavy machinery, authorizes carriage of commodities "similar to" building materials and heavy machinery. This interpretation, while grammatically permissible, would give appellant a broad and ill-defined authority. The Commission's construction—that "similar" commodities refer to those similar to the nine listed examples of "building materials and heavy machinery"—seems more closely to accord with the ordinary meaning of the words used. *Andrew G. Nelson, Inc., supra*, 355 U. S. 554. 561. Certainly it is not unreasonable. Accordingly, the district court properly sustained the Commission's interpretation as "entirely consistent with logic and common sense" (J.S. 29).

Appellant further urges that the Commission erred in applying the "intended use" test—which defines the commodities authorized to be transported "by reference to [their] intended use" (*Andrew G. Nelson, Inc., supra*, 355 U.S. at 559)—to the phrases "building materials" and "construction materials" (J.S. 13-14). However, since electric cable, transformers and regulators are capable of several uses, it seems that whether a particular shipment is "building materials" or "construction materials" will necessarily depend upon the intended use.[1] Plainly, as the district court

[1] In *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, the Commission lists "electric cable" under the heading "building materials". But the Commission has made it clear that the list is intended for general advice and guidance in classification, and does not permit the carrier to ignore contrary knowledge.

held, the Commission did not abuse its discretion in so holding.

2. In holding that in the absence of knowledge or notice of a different intended use, electric cable, transformers and regulators may be transported by appellant, the Commission gave a broad application to appellant's certificates.[2] The ruling of the Commission merely tells appellant that it may not ignore the fact that a particular shipment may fall outside its authority when the consignee is of a type who does not normally use or deal in building or construction materials. Such a requirement is neither unreasonable nor unusual.[3]

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[2] Appellant implies that the Commission's interpretation of the various commodity descriptions in appellant's certificates narrows the scope of the authority which these certificates were originally intended to confer (J.S. 5-6, 13-14). Its recourse is to petition the Commission to reopen the proceedings in which such certificates were issued. See *Andrew G. Nelson, Inc.* v. *United States*, *supra*, 355 U.S. at 561-62. In fact, appellant's petitions for reopening the proceedings in which its "heavy machinery" certificates were issued have already been heard by the Commission and await decision. Docket Nos. MC-32882 and MC-32882 (Sub No. 20). Similarly, if it be true, as appellant alleges (J.S. 19), that the Commission's interpretation results in inadequate service to those who have used appellant's services in the past, appellant can secure the necessary certificates upon proof of the need for such service.

[3] *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M.C.C. 447, sustained in *Converse* v. *United States*, 109 F. Supp. 807 (N.D. Cal. 1953); *Contractors Transit Inc.—Investigation and Revocation*, 78 M.C.C. 347, 349; *Dallas & Mavis Forwarding Co., Inc., Ext.—Galion, Ohio*, 79 M.C.C. 285, 295; *C & H Transp. Co., Inc., Clarification of Authority*, 88 M.C.C. 87, 93.

CONCLUSION

This case presents no substantial issue warranting plenary consideration by this Court. The judgment of the court below should be affirmed.

Respectfully submitted.

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